

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

76-4108

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Doc. No. 76-4108

KENSTON TRUCKING COMPANY, INCORPORATED;
KENSTON WAREHOUSING CORPORATION; and
RHEIN EXPRESS, INCORPORATED,

Petitioners,

-v-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM DECISION AND ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

PETITIONERS' BRIEF

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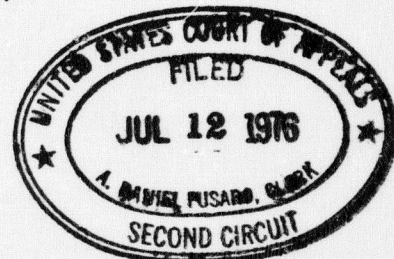


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QUESTION PRESENTED

Whether the National Labor Relations
Board erred in not finding Kenston Trucking Co.,
Inc. made Thomas Walker an unconditional offer of
reinstatement on or about June 17, 1973?

STATEMENT OF THE CASE

THE NATURE OF THE CASE AND
THE COURSE OF THE PROCEEDINGS

This is an appeal of the decision and order of the National Labor Relations Board in Kenston Trucking Company, Inc., 223 NLRB No. 68 (1975). This case arose as a proceeding to determine the amount of backpay due certain employees of Kenston Trucking Company, Inc., Kenston Warehousing Corp. and Rhein Express, Inc. (hereafter, Kenston) who had been discharged in violation of Section 8(a)(3) of the NLRA. An Administrative Law Judge of the Board held a hearing on this matter August 4, 1975. At the time of hearing, the parties settled on the amount of backpay due to each employee involved, except Thomas Walker. With respect to Walker, the Administrative Law Judge found that Kenston's president, John Luhrs, made a valid offer of reinstatement to Walker on or about June 17, 1973, tolling any backpay obligation thereafter. The Administrative Law Judge determined Walker's backpay as of June 17, 1973 at \$2,098. A three-member panel of the Board, one member dissenting, affirmed the decision of the Administrative Law Judge but concluded that the statements made by Luhrs to Walker on this date did not constitute a valid offer of reinstatement and did not relieve Kenston of its backpay

obligation to Walker. The Board set the amount of Walker's backpay at \$12,544. On or about April 20, 1976, Kenston petitioned this court for review of the Board's decision. On or about May 28, 1976, the Board's General Counsel made cross-application to this court for enforcement of its order.

STATEMENT OF THE FACTS

The record shows that on or about June 17, 1973, Kenston's president, John Luhrs, called Thomas Walker at his home and asked him to come down to the company warehouse for a talk. (App.6,7) Until his discharge in May, 1972, Walker had been an employee of Kenston at a gross weekly salary of \$185. (App.8) In September, 1972, Walker obtained a permanent position as a truckdriver with another trucking firm at a net weekly salary of \$300, or about twice the amount he earned when he worked for Kenston. (App.6) At the time of the June, 1973 meeting, Luhrs was aware that Walker was earning substantially more than the wages he had earned with Kenston. (App.10) Also, both knew that the NLRB had ordered Walker's reinstatement at his former rate of pay, plus full backpay to the date of his discharge. (App.26,35) In addition, Luhrs understood that the law obligated him to offer Walker reinstatement, without condition. (App.35)

At the hearing Walker and Luhrs each gave an account of their conversation at the June, 1973 meeting. Walker recounted, as follows:

Q Well, didn't he ask you if you wanted to come back to work for Kenston?

A Yes.

Q Didn't he tell you that the Labor Board said that he was supposed to ask you to come back to work?

A No, sir, he did not say that.

Q What did he say?

A Well, he told me that the Labor Board was giving him a hard time, and he asked me if I wanted to come back to work. (emphasis supplied)

Q What did you say to him?

A Well, at the time I told him no. (App.10,11)

Luhrs recalled his conversation with Walker as follows:

A After we had gotten the friendly part of the conversation over with, I asked him if he was willing to come back to work for me, and he said--and he asked me at what rate of pay would he -- would he be coming back at, and I told him that it would be at the rate of pay that he was making when he left. At that time he laughed at me and showed me his pay check of what he was making or what he had made for the previous week.

Q What happened after that?

A Well, we had some discussion about it. I told him that I thought it was very good, I think I even told him he'd be foolish to leave it, that if he was making that kind of money, that he should stay there.

... I did ask him, you know, if he was satisfied where he was or if he wanted to come back to work, so forth.

Q So, there's no question in your mind that you did offer him a job to come back to work?

A No, there is not.

Q There is no question in your mind?

A No.

Q And there's no question in your mind that he turned you down?

A No.

(App.31-33)

The Administrative Law Judge concluded in his decision that an unconditional offer of reinstatement had been made to Walker during this conversation. While affirming the factual findings of the Administrative Law Judge, the majority of the Board panel held that no unconditional offer of reinstatement was made by Luhrs to Walker at their meeting in June, 1973.

ARGUMENT

POINT I

STATEMENTS MADE BY KENSTON PRESIDENT, JOHN LUHRS, TO THOMAS WALKER AT A MEETING, ON OR ABOUT JUNE 17, 1973, CONSTITUTE AN UNCONDITIONAL OFFER OF REINSTATEMENT.

The record shows that on or about June 17, 1973, John Luhrs, Kenston's President, called Thomas Walker at his home and asked him to come down to the company warehouse for a talk. (App.6,7) The record indicates further that at this meeting, Luhrs asked Walker if he wanted to come back to work, at his former pay rate, and Walker said, "No". (App.10,11) This sequence of events is supported by the testimony of both Walker and Luhrs. (App.10,11,31-33) The Administrative Law Judge who presided over the hearing in this case determined that "in June, 1973 (Kenston) made to Walker an unconditional offer of reinstatement to his former position, which Walker rejected, and therefore, (Kenston's) backpay obligations to Walker terminated as of that date." (App.41) In its decision and order, the Board states that "because of the way the question was phrased" and because "we do not find that Walker's inquiry about what Luhrs would pay him meant that Walker interpreted Luhrs' question as an offer of reinstatement to his

former job", Luhrs' question to Walker could not be interpreted as a categorical invitation to return to work. (App. 43,44)

Moro Motors, Ltd., 216 NLRB No. 29, 88 LRRM 1211 (1975), is the Board's most recent case on whether an offer of reinstatement, framed as a question, to an employee can attain the stature of a categorical invitation to return to work and constitute an unconditional offer of reinstatement. In that case, the discharged employee went to the employer's premises to visit a friend. The employer's secretary-treasurer approached and stated, "We are in a hole for mechanics, would you like to come back to work here?". 216 NLRB No. 29 at 3. The employee responded, "No". 216 NLRB No. 29 at 3. The Board decided that the secretary-treasurer's question constituted an unconditional offer of reinstatement, tolling the employer's backpay obligation to the employee. The Board noted that the secretary-treasurer's offer "neither stated nor implied any conditions or qualifications", and that the employee's own testimony "reveals that he understood that (secretary-treasurer's) offer was to his former job and not just a general inquiry about his interest in returning to work for respondent". 216 NLRB No. 29 at 3. Furthermore, the Board added that "if (the employee) had any doubts concerning whether the offer was

without prejudice to his previously held seniority rights and privileges, he should have inquired." 216 NLRB No. 29 at 4.

The Board's position in the case at bar, and its attempt to distinguish Moro Motors, is without merit. The two cases are indistinguishable on the facts. In both cases, the employee testified that his employer asked him if he would like to come back to work, and in both cases, the employee said, "No". In the case at bar, Walker stated, without equivocation, on direct examination, that "He (Luhrs) asked me if I wanted to come back to work", and "... I told him, 'No'." (App.10,11) Luhrs concurred, on direct examination, that "... I asked (Walker) if he was willing to come back to work for me." (App.31) The Board decided in Moro Motors that the question, "We are in a hole for mechanics, would you like to come back to work here?" constituted an unconditional offer of reinstatement. The question in Moro Motors and in the case at bar are identical -- did the employee want to return to work? The decision in the case at bar must be the same as in Moro Motors -- the question constituted an unconditional offer of reinstatement.

The Board is obligated to follow its own precedent in cases indistinguishable on the facts. This doctrine was enunciated as follows in N.L.R.B. v. Mall Tool Co.,

119 F.2d 700 (7th Cir., 1941):

"Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board's powers. Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 61 S.Ct. 77, 85, L.Ed. ____; Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126; National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627, 123 A.L.R. 599."

(119 F.2d at 702)

The Board acts arbitrarily and outside the scope of its powers where it adopts a different standard in the case at bar for a situation so similar to and encountered so recently in Moro Motors.

In the case at bar, the Administrative Law Judge also found that "the logic of the situation would have impelled Luhrs to offer unconditionally to reinstate Walker because Luhrs could anticipate that such offer would be rejected." (App.41) In June, 1973, Luhrs was aware that Walker was earning about twice as much with another trucking firm as he had earned when employed by Kenston. (App.41) Luhrs also knew of his obligation to offer Walker unconditional reinstatement. On these facts, the Administrative Law Judge concluded that the record evidence favored a finding that an uncon-

ditional offer of reinstatement was made. As the Board itself stated in Moro Motors, "If the employee had any doubts concerning whether the offer was for the job he previously held, which he clearly did not, or concerning whether the offer was without prejudice to his previously held seniority, rights, and privileges, he should have inquired." 216 NLRB No. 29 at 4.

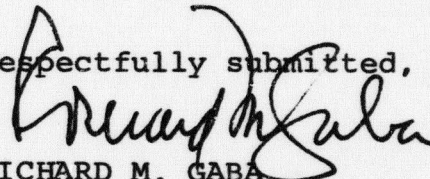
Both the employer, Luhrs, and the employee, Walker, are laymen, without the sophistication to appreciate the "words of art" of the legal profession. Yet, the Board would distinguish the employer's inquiry to the employee in this case from that in Moro Motors "because of the way the question was phrased". It is unjust to hold these two laymen to some level of precision in phraseology, especially when this level is not anywhere defined. Moreover, the parties here were attempting to recall a conversation that had taken place over two years earlier. To base a decision, as the Board did, on one line of testimony by the employer to the exclusion of admissions by the employee, and the findings of fact and conclusion of the Administrative Law Judge hearing this case, is arbitrary and unreasonable. As member Jenkins stated in his dissenting opinion to the Board's decision,

"While the language is not precise as lawyers might employ, it seems plain to me that these facts constitute a proper offer to reinstate Walker, which terminated (Kenston's) backpay liability. The fact that questions instead of declarative sentences were used hardly precludes the making of an offer, any more than threats lose their character because couched as questions." (App.45)

CONCLUSION

In June, 1973, Kenston's President, John Luhrs, made to Thomas Walker an unconditional offer of reinstatement to his former position, which Walker rejected, and therefore, Kenston's backpay obligations to Walker terminated as of that date. Therefore, the proper amount of backpay due to Thomas Walker is \$2,098.

Respectfully submitted,



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